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ML BREADWORKS SDN BHD

v.

RHB BANK BHD

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HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI JC
[WRIT OF SUMMONS NO: D-22NCC-1002-2011]
19 NOVEMBER 2013

C

BANKING: *Banking and customer - Forgery - Claim for amount loss due to forgery of signatory's signature on cheques - Loss in sum of RM1,000,373.45 - Forgery detected when balance became insufficient - Whether bank in contractual breach with customer by debiting amount from customer's current account - Whether bank negligent - Whether bank*

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exercised reasonable care and duty in honouring forged cheques - Whether bank entitled to rely on statutory defence under s. 73A of Bills of Exchange Act 1949

BANKING: *Cheques - Forged cheques - Customer's accountant forged cheques and caused loss in sum of RM1,000,373.45 - Whether bank*

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negligent - Whether customer contributorily negligent - Whether customer took necessary steps to supervise and monitor accountant - Whether customer kept track of current account

TORT: *Conversion - Banking and customer - Cheques - Customer's*

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accountant forged cheques and caused loss in sum of RM1,000,373.45 - Forged cheques cleared by bank - Liability of bank - Whether bank liable to make good loss - Bills of Exchange Act 1949, s. 24

The plaintiff was the defendant's customer and held a current

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account. The plaintiff's accountant ('Lim') had forged the signature of one of the signatories of the current account on two occasions whereby each cheques ('the disputed cheques') bore the sums of RM569,821.35 and RM430,552.10, respectively. The disputed cheques were cleared by the defendant. The forgery was

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only detected when the plaintiff received a call from the defendant informing the former of insufficient balance in its current account. The plaintiff averred that the defendant had breached its contract with the plaintiff by causing the sum of RM1,000,373.45 ('the said sum') to be debited from the plaintiff's current account; and

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was negligent and had failed to exercise reasonable care and duty in honouring the disputed cheques. In the present claim for

recovery of the said amount, the plaintiff sought for (i) a declaration that the defendant had wrongfully debited the said sum into the plaintiff's account; and (ii) judgment against the defendant for the said sum to be paid to the plaintiff. The issues that arose for the court's adjudication were (i) whether the defendant's act in honouring the said cheques amounted to negligence, breach of contract and/or conversion; and (ii) whether the defendant was entitled to rely on the statutory defence under s. 73A of the Bills of Exchange Act 1949 ('the Act').

Held (dismissing claim with costs):

(1) There was no dispute that the cheques were forged and were cleared by the defendant. Under s. 24 of the Act, the liability of a bank is premised on the tort of conversion and a banker who pays out on a forged instrument drawn on his customer account is absolutely liable to make good the loss. Therefore, based on the decision of *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd*, the act of the defendant in honouring the forged cheques amounted to negligence and/or conversion and the bank was liable to make good the loss of the plaintiff. (paras 6 & 8)

(2) However, s. 73A of the Act was enacted to provide defence to the banks in cases where the drawer had knowingly or negligently contributed to the forgery or making of the unauthorised signature. The defendant had proved that the plaintiff had negligently contributed to the forgery or the making of the unauthorised signature of the cheques. The plaintiff was negligent for failing to ensure that Lim carried out his duties honestly and for failing to conduct regular checks on the banking transaction. The plaintiff had access to the Reflex system, an online service *via* the internet, which allows customers to monitor their current account. The fact that the plaintiff came to know about the forgery after being informed by the defendants on the insufficient balance clearly showed the failure of the plaintiff to monitor its own account. (paras 12, 16)

(3) The defendant had availed itself to the statutory protection under s. 73A of the Act. The defendant had a system in place and had conducted themselves as a reasonable and prudent banker dealing with the day-to-day affairs of the operation of

A the plaintiff's accounts. Bearing in mind that the top management operated from Singapore, it was pertinent and incumbent on the plaintiff to give instructions to the defendant to call the authorised signatories to confirm the issuance of the cheques, especially since the amount involved was a large sum.
B (para 16, 19 & 20)

Case(s) referred to:

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 FC ***(refd)***

C *Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd [2012] 6 CLJ 423 HC* ***(refd)***

Melewar Apex Sdn Bhd v. Malayan Banking Bhd [2007] 8 CLJ 579 HC ***(refd)***

ML Breadworks Sdn Bhd v. Malayan Banking Bhd [2013] 1 CLJ 833 HC

Public Bank Bhd v. Anuar Hong & Ong [2005] 1 CLJ 289 HC ***(refd)***

D *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC* ***(refd)***

Legislation referred to:

Bills of Exchange Act 1949, ss. 24, 73A, 95

E *For the plaintiff - Muhammad Adam Abdullah (Fareez Zahir with him); M/s Adam Abdullah & Mani*

For the defendant - S Nantha Balan (Natalia Izra with him); M/s Zul Rafique & Partners

Reported by Najib Tamby

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JUDGMENT

Azizah Nawawi JC:

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The Plaintiff's Claim

[1] The plaintiff, ML Breadworks Sdn Bhd, a member of the multinational group, Breadtalk Group Ltd of Singapore, filed this suit against the defendant, RHB Bank Bhd seeking the following
H reliefs:

(i) a declaration that the defendant had wrongfully debited the plaintiff's account for the sum of RM1,000,373.45;

I (ii) Judgment against the defendant for the sum of RM1,000,373.45 to be paid to the plaintiff; and

(iii) Interest and costs.

[2] The plaintiff's claim against the defendant is as follows:

(i) At all material time, the plaintiff was the defendant's customer and held a current account bearing the account number 0004918-1 ("the Account") at the defendant's branch located in Mid-Valley, Kuala Lumpur.

(ii) At the material time the authorized signatories of cheques issued under the current account were as follows:

(a) Group A - Eric Toh Kiam Hwee and James Quek Seng Hwa ("the Group A Signatories"); and

(b) Group B - Catherine Lee Khia Yee and Goh Tong Pak ("the Group B Signatories").

(iii) The Group A Signatories were authorised to sign cheques for amounts of up to RM50,000 whilst cheques bearing any amount exceeding RM50,000 were only to be signed by the Group B Signatories.

(iv) In August 2010, an employee of the plaintiff named Lim Li Khim, the accountant of the plaintiff, had forged the signatures of the Group B Signatories on the cheque number 098860 ("the first disputed cheque") bearing the sum of RM569,821.35 and which was made out to one Alpha Stellar (M) Sdn Bhd.

(v) In October 2010, Lim Li Khim had again forged the signatures of the Group B Signatories on the cheque number 098867 ("the second disputed cheque") bearing the sum of RM430,552.10 and which was made out to one Kashifa Trading.

(vi) The plaintiff pleads that the defendant was negligent and had failed to exercise reasonable care and duty in honouring the said disputed cheques, whereby the said alleged negligence and/or failure had caused the plaintiff to suffer loss and damage in the total sum of RM1,000,373.45.

(vii) Alternatively, that the defendant had, in breach of the contract between the plaintiff and the defendant, caused the said sum of RM1,000,373.45 to be debited from the account. Hence, the filing of this suit is to recover the said amount.

The Defence

[3] The defence of the defendant is as follows:

(i) that at all material time the defendant had exercised reasonable care and skill in respect of the account and had at all times acted properly and in accordance with its mandate.

(ii) that the defendant had obtained telephone confirmation of the disputed cheques from the plaintiff on 30 August 2010 and 28 October 2010 respectively. This confirmation was given by Lim Li Khim, the accountant of the plaintiff.

(iii) At the material time, the only contact numbers provided by the plaintiff to the defendant were the telephone and fax numbers of the plaintiff's office in Kuala Lumpur. The plaintiff did not provide the defendant with the personal contact numbers of the authorised signatories.

(iv) All the authorised signatories of the plaintiff were Singaporean citizens based in Singapore.

(v) The disputed cheques were validly and regularly issued, bearing the requisite mandate from the plaintiff and/or were duly ratified by the plaintiff. The defendant had no notice whatsoever of any defect or discrepancy in relation to the disputed cheques and had at all material times acted in accordance with the plaintiff's mandate and/or authority and further acted in good faith, without negligence and discharged its duties with reasonable care. In connection to this, the defendant will refer to and rely upon s. 24 and/or s. 73A of the Bills of Exchange Act 1949.

(vi) Alternatively, if at all any loss and damage have been suffered by the plaintiff (which is not admitted), such loss and damage was caused by the plaintiff's own negligence, the particulars of which are as follows:

(a) The plaintiff had failed and/or neglected to exercise reasonable care and duty as regards the drawing and issuing of cheques from the current account;

(b) The plaintiff had failed and/or neglected to take reasonable precautions to safeguard the current account cheque book;

(c) The plaintiff had failed and/or neglected to take reasonable precautions to prevent against forgery of authorised signatures; A

(d) The plaintiff had failed and/or neglected to put in place an adequate system of checks and balances for drawing of cheques from the account and/or neglected to monitor and/or supervise and/or control the issuance of cheques from cheque books for the current account which were at all material times kept by the accountant of the plaintiff, one Lim Li Khim; B C

(e) The plaintiff had failed and/or neglected to exercise reasonable care and duty in supervising its own employees with regard to the account and/or the drawing of the disputed cheques; D

(f) The plaintiff had expressly and/or impliedly instructed and/or allowed the defendant to deal with and/or knew or ought to have known at all material times that the defendant was dealing with the plaintiff's personnel who were not cheque signatories, for purposes of, *inter alia*, cheque verification; E

(g) In this regard, the plaintiff knew or ought to have known or had the means of knowing that prior to the dates when the disputed cheques were cleared for payment the defendant did not have the telephone contact numbers of the cheque signatories who were all residing in Singapore; F

(h) In the circumstances the plaintiff is accordingly estopped from maintaining that *vis-a-vis* the disputed cheques, the defendant ought to have sought verification from the cheque signatories; G

(i) By reason of its conduct, the plaintiff took a risk by authorising, allowing or acquiescing to the defendant obtaining verification from personnel within the plaintiff who are not cheque signatories; H

(j) In view of the plaintiff's own negligence, the plaintiff is accordingly estopped from maintaining that *vis-a-vis* the disputed cheques, the defendant ought to have sought direct verification regarding the said cheques from the cheque signatories. I

The Salient Fact

[4] The facts which are not in dispute are as follows:

(i) In August 2010, an employee of the plaintiff named Lim Li Khim had forged the signatures of the Group B Signatories on the cheque number 098860 bearing the sum of RM569,821.35 and which was made out to one Alpha Stellar (M) Sdn Bhd. This cheque, dated 13 August 2010 was cleared by the defendant on 27 August 2010. Lim Li Khim was the accountant of the plaintiff in the Kuala Lumpur office at the material time.

(ii) In October 2010, Lim Li Khim again forged the signatures of the Group B Signatories on the cheque number 098867 dated 18 October 2010 bearing the sum of RM430,552.10 and which was made out to one Kashifa Trading. The second cheque was cleared on 27 October 2010.

(iii) The forgery was only detected in early November 2010 when the plaintiff received a call from the defendant's branch in Mid-Valley informing them of insufficient balance in the account.

(iv) The plaintiff then lodged three police reports against the forger, Lim Li Khim.

(v) There is no dispute that the two cheques were forged by Lim Li Khim.

Issues

[5] Having considered the evidence, the exhibits before this court and the submission of the parties, I am of the considered opinion that there are essentially two issues in this case:

(i) Whether the act of the defendant in honouring the said cheques amount to negligence, breach of contract and/or conversion; and

(ii) Whether the defendant is entitled to rely on the statutory defence under s. 73A of the Bills of Exchange Act 1949.

The Findings Of The Court

Issue (i)

Whether The Act Of The Defendant In Honouring The Said Cheques Amounts To Negligence, Breach Of Contract And/Or Conversion

[6] At common law the liability of a bank is premised on the tort of conversion and a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. This common law position has been codified in s. 24 of the Bills of Exchange Act 1949 which reads:

> 24. Subject to the provisions of the Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority ...

[7] Both the common law position and s. 24 Bills of Exchange Act 1949 were considered by the Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31, where the court said this:

> ... Therefore, at common law a banker who pays out on a forged instrument drawn on his customers account is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it. The common law has been codified in s. 24 of the Bills of Exchange Act 1949, which creates a limited exception in favour of the banker.

[8] In the present case, there is no dispute that the first cheque dated 13 August 2010 and the second cheque dated 18 October 2010 are forged cheques. And it is also not in dispute that the first cheque was cleared by the defendant on 27 August 2010, whereas the second cheque was cleared on 27 October 2010. Therefore, based on the Supreme Court decision in *United Asian Bank* case, the act of the defendant in honouring the forged cheques amount to negligence and/or conversion and the bank is liable to make good the loss of the plaintiff.

A **Issue (ii)**

Whether The Defendant Is Entitled To Rely On The Statutory Defence Under Section 73A Of The Bills Of Exchange Act 1949?

B **[9]** The next issue then is whether the defendant is entitled to rely on the statutory defence under s. 73A of the Bills of Exchange Act 1949, which reads:

> Notwithstanding section 24 where a signature on a cheque is forged or placed thereon without the authority of the person
C whose signature it purports to be, and that person whose signature it purports to be **knowingly or negligently contributes to the forgery** or the making of the unauthorised signature, *the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.* (emphasis added)

D **[10]** The purpose of the inclusion of s. 73A is to provide some protection to the banks. This is reflected in the Hansard when the Deputy Finance Minister gave his speech in introducing the Amendment Bill in 1997. The courts may refer to the Hansard in
E order to ascertain the purpose of a particular provision of an Act or the Act itself. In *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57, Haidar FCJ applied the purposive approach that is to be derived by referring to Parliamentary reports or Hansard. At p. 69
F His Lordship said as follows:

> This is permissible as held by the Federal Court in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285. This is what Edgar Joseph Jr FCJ, speaking for the court, after reviewing a number of cases from different jurisdictions, said at p. 299:
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> > We have also considered the cogent criticisms of the majority view in *Pepper v. Hart*, by Mr JH Baker in his article entitled '*Statutory Interpretation and Parliamentary Intention*' [1993] 52 Lamb LJ 353; by Mr Brian Davenport in his article entitled '*Perfection - But At What Cost?*' [1993]
H > > 109 LQR 149; and Mr David Miers in his article entitled '*Taxing Perks And Interpreting Statutes*' [1993] 56 MCR 695. Nevertheless, we have arrived at the conclusion that we should follow the recent trend of the cases decided in the United Kingdom, Australia, New Zealand and Singapore
I > > and permit a relaxation of the exclusionary rule by allowing

> a reference to Hansard as an aid to statutory interpretation where the enactment is ambiguous or obscure, or which if literally construed might lead to absurdity and provided always that the statement reported in Hansard was made by a Minister or other promoter of a Bill. More particularly, we gratefully adopt the passage in the judgment of Lord Browne-Wilkinson in *Pepper v. Hart*, reproduced above.

[11] His Lordship Justice Haidar then referred to the decision in *Pepper v. Hart* which was quoted by Edgar Joseph Jr FCJ in *Chor Phaik Har*'s case. The passage which was quoted with approval was as follows:

> My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee any statement other than the statement of the minister or other promoter of the Bill is likely to meet these criteria.

Further on at p. 74 Haidar FCJ stated:

> In addition thereto, it is permissible for the courts, as held by the Federal Court in *Chor Phaik Har*, to resort to the Hansard as an aid to interpretation. **We can therefore look at the policy speech of the Minister when tabling the Bill for the purpose or the object of the Bill as an aid to interpretation**. (emphasis added)

[12] When we look at the policy speech of the Deputy Finance Minister in introducing the Amendment Bill in 1997, it is very clear that the provision was enacted to provide a defence to the banks in cases where the drawer had knowingly or negligently contributed to the forgery or the making of the unauthorised signature. The Minister said this in the policy speech:

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RANG UNDANG-UNDANG BIL PERTUKARAN (PINDAAN) 1997

Bacaan Kali Kedua dan Ketiga
Timbalan Menteri Kewangan
[Dato' Dr. Affifudin bin Haji Omar]:

B

Tuan Yang di-Pertua, saya mohon mencadangkan iaitu Rang Undang-undang bernama suatu rang undang-undang Akta Bil Pertukaran (Pindaan) 1997 iaitu satu akta untuk meminta Akta Bil Pertukaran 1949 dibacakan untuk kali yang kedua.

C

... Salah satu lagi cadangan pindaan adalah berhubungan dengan isu tandatangan palsu atau tandatangan yang telah diperbuat tanpa kuasa pada cek. Suatu bank yang membuat bayaran atas suatu cek yang mengandungi tandatangan palsu adalah bertanggungan sepenuhnya bagi kerugian yang ditanggung oleh pelanggannya. Ini adalah berdasar prinsip bahawa bank tersebut tidak mempunyai mandat secara nyata atau tersirat untuk membuat bayaran tersebut. Prinsip undang-undang di Malaysia dalam hal ini adalah berdasarkan kepada Common Law. Seseorang pelanggan hanya mempunyai dua kewajipan kepada banknya iaitu:

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(i) ditegah daripada menulis ceknya dengan cara yang memudahkan penipuan atau pemalsuan; dan

(ii) memaklumkan kepada banknya tentang apa-apa pemalsuan cek dari akaunnya dengan seberapa segera setelah ia mengetahui mengenai pemalsuan tersebut.

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Berdasarkan prinsip di atas, pelanggan bank tidak mempunyai kewajipan untuk mengambil langkah berhati-hati dalam pengurusan am perniagaanya untuk mencegah pemalsuan oleh kakitangannya. Seorang pelanggan juga, tidak mempunyai kewajipan untuk memeriksa penyata bulanan bank untuk memastikan bahawa akaunnya dikendalikan secara wajar dan patut.

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Dalam menentukan liabiliti bank dalam hal ini, fakta bahawa pelanggan tersebut telah bertindak secara cuai sehingga memudahkan pemalsuan tersebut adalah tidak material. *Bank Negara Malaysia berpendapat, bahawa risiko yang harus ditanggung oleh suatu bank semasa membuat pembayaran atas sesuatu cek yang mengandungi tandatangan palsu atau yang telah diperbuat tanpa kuasa perlu dibataskan. Batasan yang dicadangkan berbangkit dalam keadaan di mana tandatangan palsu atau yang telah diperbuat tanpa kuasa tersebut berpunca daripada kecuaian atau tindakan pelanggan yang disengajakan iaitu dengan tujuan untuk memudahkan pemalsuan tandatangan atau pembuatan tandatangan tersebut tanpa kuasanya.*

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Tuan Yang di-Pertua, secara ringkasnya pindaan-pindaan yang dicadangkan adalah perlu: A

(i) …;

(ii) …; dan

(iii) membataskan liabiliti bank pembayar dalam hal cek yang mengandungi tandatangan palsu atau yang diperbuat tanpa kuasa sekiranya tuan punya cek itu sendiri dengan sengaja telah bertindak secara cuai dan mempermudahkan pembuatan tandatangan palsu tersebut. B C

Tuan Yang di-Pertua, saya ingin membawa perhatian Dewan yang mulia ini kepada beberapa pindaan utama yang dicadangkan.

Fasal 2 bertujuan untuk mengadakan peruntukan baru Seksyen 3A. Peruntukan baru ini bertujuan untuk mengadakan peruntukan berhubungan dengan liabiliti bank pembayar dalam hal cek yang mengandungi tandatangan palsu atau yang diperbuat tanpa kuasa. D

Sekiranya tandatangan palsu atau yang diperbuat tanpa kuasa adalah berpunca daripada kecuaian atau ketindakan yang disengajakan sehingga memudahkan pemalsuan atau tandatangan tersebut dibuat tanpa kuasa maka tandatangan tersebut akan disifatkan sebagai tandatangan orang yang cuai tersebut. (emphasis added) E

[13] The statutory defence under s. 73A was considered by the court in *Melewar Apex Sdn Bhd v. Malayan Banking Bhd* [2007] 8 CLJ 579, where the court held at p. 587 H - 588B: F

[35] A close perusal of s. 73A shows that the burden is upon the bank to prove the drawer had knowingly or negligently contributed to the forgery or the making of the unauthorised signature. G

[36] It is clear that s. 73A was not a complete but was a qualified reversal of the previous law, placing the burden upon the bank to prove that the drawer:

(a) had acted knowingly or negligently; and H

(b) thereby contributed

(i) to the forgery or

(ii) the making of the unauthorised signature. I

[14] In *ML Breadworks Sdn Bhd v. Malayan Banking Bhd* [2013] 1 CLJ 833 Justice Nallini held that s. 73A provides a clear and complete defence if the bank can prove that the customer was complicit or negligent in facilitating the forgery. Bearing in mind that the purpose of the amendment is to provide protection to the banks in cases of forgery, I agree with the findings of Justice Nallini where she explained the ambit of s. 73A at p. 835:

> Section 73A of the Bills of Exchange Act 1949 statutorily alters or amends the common law position, to the extent that it provides a complete defence to any claim for monies from the paying institution or bank under a forged instrument where the same customer, knowing that the instrument was forged, contributed to it, or negligently allowed the forgery to be perpetrated. **Section 73A provides a clear and complete defence if the bank can prove that the customer was complicit or negligent in facilitating the forgery**. (emphasis added)

[15] The next issue then is whether the defendant has proven that the plaintiff "knowingly or negligently contributes to the forgery or the making of the unauthorised signature" so that the forged signature is deemed to have been authorised by the plaintiff and provides the defendant a complete defence against the plaintiff's claim.

[16] Having heard the witnesses and considered the whole evidence, I am of the considered opinion that the defendant had proven that the plaintiff had negligently contributed to the forgery or the making of the unauthorised signature of the two cheques. My reasons are as follows:

(i) It is not in dispute that all the top management of the plaintiff are based in Singapore. PW1 and PW2 gave evidence that the cheques would be prepared in Kuala Lumpur and sent to Breadtalk Group headquarters in Singapore for signing by the authorised signatories.

In the Kuala Lumpur office, the management of the current account was left entirely to the forger, Lim Li Khim. The cheque books, the authority to issue the cheques and the duty to conduct the cheque reconciliation are left entirely on one person, the forger himself, Lim Li Khim.

Both PW1 and PW2 gave evidence that to reduce forgery, Lim Li Khim was under the supervision of Eric Toh on finance matters. But Eric Toh was also based in Singapore, and that it is the evidence of PW1 that Eric Toh would visit the Kuala Lumpur office only 'sometimes once a month because he had to travel around Asia.'

Eric Toh was not called to give evidence on what kind of supervision he had on the forger, Lim Li Khim. Without the evidence of Eric Toh, I am left to conclude that there was hardly any supervision at all on Lim Li Khim to enable the forgery to take place.

(ii) There was no effective supervision on Lim Li Khim, who only joined the company in June 2010 and is still on probation. I am of the considered opinion that it was the duty of the plaintiff to supervise Lim Li Khim and to monitor his duties as the plaintiff's accountant. It is also the duty of the plaintiff to check all the banking transactions carried out with the defendant. The plaintiff was therefore in breach of such duty and was negligent by failing to properly supervise Lim Li Khim at all material times. The plaintiff was negligent for failing to ensure that Lim Li Khim carried out his duties honestly and in good faith through close supervision. The plaintiff was also negligent for failing to conduct regular checks on the banking transaction. The plaintiff was also negligent in giving Lim Li Khim 'a free hand' in the management of the accounts, to the extent that Lim Li Khim was also entrusted to conduct the cheque reconciliation. There is clearly no check and balance as far as the duties of the forger, Lim Li Khim is concerned.

(iii) Bearing in mind that the top management operates from Singapore, it is pertinent and incumbent on the plaintiff to give instruction to the defendant to call the authorised signatories to confirm the issuance of the cheques, especially here when the amount involved is a large sum. They could have given the private numbers of the Singapore signatories or their email addresses. Instead, the plaintiff put the blame on the defendant for failing to call the authorised signatories who are all in Singapore, by ascertaining the telephone numbers of the Singapore signatories. Surely a prudent foreign entity would ensure that they engaged the banks directly on financial

matters if they have minimal control over the management of their local office. In fact, it is only after the event did the plaintiff issued instructions that the defendant is to call the authorised signatories for the purpose of cheque confirmation in a letter dated 16 November 2010, in which the name of the authorised signatories with their mobile telephone numbers, office numbers and email addresses were stated.

(iv) I am also of the considered opinion that since the cheques will have to be signed by management in Singapore, it would have been more prudent for the cheque book to be kept in Singapore, as not many cheques were issued each month anyway. There was only one cheque issued in August, the cheque under contention. By leaving the cheque book in the hands of Lim Li Khim, the plaintiff was negligent as it enables Lim Li Khim to commit the forgery.

(v) The plaintiff had access to the Reflex system which is an online service via the internet. The Reflex system allows customers to monitor their current account to determine the transactions that are being conducted in the account, including the deposits, the withdrawals and the balance available. The fact that the plaintiff only came to know about the forgery after being informed by the defendants on the insufficient balance in the account clearly show the failure of the plaintiff to monitor its own account *via* the Reflex system. This is crucial as the top management operates from Singapore.

(vi) I also find it incredible that the plaintiff had failed to ascertain whether the sum of half a million had been deposited in UOB (the first cheque). We are not talking about a small sum here, but more than half a million ringgit. This shows the lackadaisical attitude of the plaintiff on the management of its account. If the plaintiff had ascertained that the cheque had not been deposited in the UOB account, the second forged cheque could have been prevented. I am therefore of the opinion that the plaintiff has failed to put in place the necessary precautions and safeguards to ensure that the fraud and forgery will not happen. In this regard, I am in full agreement with the decision of the High Court in *Public Bank Bhd v. Anuar Hong & Ong* [2005] 1 CLJ 289 where it was held:

> The customer clearly owes a duty not to facilitate fraud... the Respondent as employer appeared to have been rather lax in exercising its supervision in respect of its financial affairs... the Respondent has clearly failed to exercise due care in protecting their own interest from any misconduct of their own employees.

(vii) The plaintiff had relied heavily on the evidence of PW1 Goh Tong Pak and PW2, Janice Teo Keok Har. However, I agree with the submission of learned counsel for the defendant that neither of these two witnesses were the appropriate persons to give evidence on behalf of the plaintiff. PW1 had admitted that he was not aware of the process and/or operations in the finance department in the plaintiff's office in Kuala Lumpur. PW1 only visit the KL office once or twice a year. PW1 did not even know who had possession of the plaintiff's cheque book and he did not know anything about Lim Li Khim. PW2 was not involved in the finance department at the relevant time. The plaintiff should have called Catherine Lee, the Chief Financial Officer of the plaintiff at the material time to explain the management of the finance matters. Eric Toh, who was Lim Li Khim's supervisor was not called to explain the so called supervision that he had over Lim Li Khim. Vincent Toh, who carried the investigation into the forged cheques and who terminated the employment of Lim Li Khim as the plaintiff's accountant was not called to give evidence on the findings of his investigation. Surely his investigation would have dealt with the weakness in the finance department which allows the forgery to happen. As such, I find that the evidence of PW1 and PW2 do not provide credible evidence on adequate supervision and management control in the finance department in the plaintiff's Kuala Lumpur office.

[17] In *Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd* [2012] 6 CLJ 423; [2013] 7 MLJ 25, the court held as follows:

> The plaintiff had knowingly or negligently contributed to or facilitated the forgery ...
>
> The evidence was clear the plaintiff ... failed to take reasonable precautions in the management of its business to prevent the continuing forgery and alert the bank to avoid s. 73A defence by the bank.

A The defendant had made out a case to rely on the statutory defence encapsulated in s. 73A. As to that part of s. 73A relating to good faith in paying out on the cheques, the court was satisfied that the defendant had a system in place and had conducted itself as a reasonable and prudent banker dealing with the day to day affairs of the operation of the plaintiff's account. The Act itself places a low threshold for the defendant to satisfy when relying on the term good faith.

[18] The term 'good faith' is defined by s. 95 of the Act which reads:

C A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

[19] In the factual matrix of this case, I am satisfied that the D defendant has a system in place and has conducted themselves as a reasonable and prudent banker dealing with the day-to-day affairs of the operation of the accounts of the plaintiff.

[20] In the premise, I find that the defendant has availed itself E to the statutory protection under s. 73A of the Bills of Exchange Act 1949 and the plaintiff's case is hereby dismissed with cost.

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